85-1554

No.

Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN RE: ADOPTION OF:
BABY GIRL LEDBETTER, a Minor,

ROBERT DENNIS SANTARELLI and
KAREN SUE SANTARELLI,
Petitioners,

v.

JAMES C. ELLISON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

CHRISTIAN R. VAN DEUSEN
(Counsel of Record)
CHRISTIAN R. VAN DEUSEN, INC.
615 Civic Center Drive West, #300
Santa Ana, CA 92701
(714) 547-6226

TEPPER & GWINN
(Co-Counsel)
P.O. Box 548
Urbana, Illinois 61801
(217) 367-5406
For Petitioners

WILSON - EPES PRINTING CO., INC - 789-0096 - WASHINGTON, D.C. 20001

5614

QUESTIONS PRESENTED

1. Do Adoptive Parents have standing to be heard and to examine witnesses to determine paternity of the child they seek to adopt?

2. Does the due process and equal protection clause require the consideration of the best interest of the child and the balancing of that interest against parental rights?

3. Does the due process and equal protection clause require that psychological and biological parents be treated equally, as pertains to their right to maintain that parent-child relationship?

PARTIES BELOW

The following parties who by their respective counsel participated in the proceedings below:

Robert and Susan Santarelli by John Gwinn Esq.

P.O. Box 548, Urbana, IL 61801 (217) 367-5406

James C. Ellison by Ames & Manecke,
Attorneys at Law

139 E. First Street, Coal Valley, IL 61240
(309) 799-7366

Baby Girl Ledbetter by Larry R. Silkwood

207 W. Elm, Urbana, IL 61801 (217) 344-6265

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	i
TABLE OF AUTHORITIES	iv
OPINIONS IN THE STATE COURTS	1
JURISDICTION	2
CONSTITUTIONAL ISSUE	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT OF CERTIORARI	5
I. State Courts Are Applying Varying Tests and Burdens of Proof in Determining Custody Issues in Adoption Cases. The Results, All Too Frequently, Are to the Detriment of the Minor Children Involved, Totally Ignoring Their Best Interests by Destroying Established Family Units, and Removing Helpless Children From Their Psychological Parents	6
II. The Trial Court Denied the Adoptive Parents Standing to Challenge the Hearsay Statements of Robert W. Ledbetter, Jr., the Presumed Father, in Which He Denied Paternity	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Adoption of Barnett, 54 Cal. 2d 370 (1960) 8, 10
Adoption of Duckett, 48 Cal. App. 3d 244 (1975).. 10
Adoption of Michelle T., 44 Cal. App. 3d 699 (1975) 12, 14
Adoption of Tachick, 210 N.W. 2d (Wis. 1973) 13
Brown v. County of San Joaquin, 601 F. Supp. 653 (E.D. Cal. 1985) 9, 15, 16
Bixby v. Pierno, 4 Cal. 3d 130 (1971) 8
Caban v. Mohammed, 441 U.S. 380 (1979) 16
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 16
C.V.C. v. Superior Court, 29 Cal. App. 3d 909 (1973) 8
Doe v. State of New Jersey, 165 N.J. Super. 392, 398 A.2d 562 (1979) 6
Hoy v. Willis, 165 N.J. Super. 265, 398 A.2d 109 (1978) 6
In re Baby Girl M., 37 Cal. 3d 65 (1984) 6, 7
Lehr v. Robertson, 463 U.S. 248 (1982) 6, 17
Michael U. v. Jamie B., 39 Cal. 3d 787 (1985) 6, 7
Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).. 15
Quillion v. Walcott, 434 U.S. 246 (1978) 15, 16
San Diego County Department of Public Welfare v. Superior Court, 7 Cal. 3d 1 (1972) 10
Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 16
Wisconsin v. Yoder, 406 U.S. 205 (1972) 16
Williams v. Neumann, 405 S.W. 2d 566 (Ky. 1974) 13

Constitution, Statutes and Rules:

Fourteenth Amendment ..... *passim*
MICH. COMP. LAWS ANN. § 722.23 (1976) 12
28 U.S.C. § 1257(3) (1948) 3

Miscellaneous:

Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975) 9, 10

TABLE OF AUTHORITIES—Continued

Page

In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings, 51 N.Y.U. L. Rev. 446 (1977) 11

tenBroek, *California's Adoption Law and Programs*, 6 HASTINGS L.J. 261 (1955) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

IN RE: ADOPTION OF:
BABY GIRL LEDBETTER, a Minor,

ROBERT DENNIS SANTARELLI and
KAREN SUE SANTARELLI,
Petitioners,

v.

JAMES C. ELLISON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable Warren E. Burger, Chief Justice of the United States Supreme Court, and to the Honorable Associate Justices:

Petitioners respectfully urge that a writ of certiorari issue to review the order denying their application for leave to appeal to the Supreme Court of Illinois, issued October 2, 1985, allowing to stand the decision of the Illinois Court of Appeal issued March 25, 1985, and denying their motion for reconsideration by order issued on January 30, 1986.

OPINIONS IN THE STATE COURTS

The Petitioners Santarelli appealed dismissal of their petition to adopt Baby Girl Ledbetter to the Illinois Court of Appeal. That court reversed and remanded the case based on failure to join the presumed father, a necessary party. (125 Ill. App. 3d 306)

On remand, the attorney for Respondent, James C. Ellison, entered an appearance signed and verified by the presumed father, Robert W. Ledbetter, Jr. Therein, he denied any interest in the child and further denied that he was the father. The trial court thereupon affirmed its prior order awarding custody to the putative father, Respondent, Ellison and dismissing Petitioner's Adoption Petition. (Appendix A)

Petitioners Santarelli appealed, asserting, *inter alia*, that they were denied the opportunity to cross-examine the presumed father as to his assertion that he had no access and therefore could not be the father. However, the court accepted the appearance and the hearsay therein contained, vitiating any issue of fact as to the actual paternity of the child.

That appeal was denied by an opinion filed March 25, 1985. (Appendix B) Thereafter, the Petitioners applied for Leave to Appeal to the Supreme Court of Illinois (Appendices C & D) On October 2, 1985, the Supreme Court of Illinois denied the Petition for Leave to Appeal. (Appendix E) On January 30, 1986 the Motion for Reconsideration was denied.

JURISDICTION

On October 2, 1985 the Supreme Court of Illinois denied leave to appeal thereby affirming the trial court's order awarding custody of the child to the putative father and dismissing the Adoption Petition of the Santarellis. On December 31, 1985 Petitioners' counsel was informed by the clerk's office of the United States Supreme Court that the Court was closed. A petition for Writ of Certiorari was delivered to the Office of the Clerk of the Supreme Court of the United States on January 2, 1986. The petition was returned as untimely. (Appendix F) On January 30, 1986, the Supreme Court of the State of Illinois denied Petitioner's motion for leave to file a motion for reconsideration of the order

denying Petition for Leave to Appeal while at the same time denying Respondents Motion to Strike the same motion. (Appendix G) This petition for Writ of Certiorari was filed within 90 days of that date. This petition is brought under 28 U.S.C. § 1257(3).

CONSTITUTIONAL ISSUE

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor to deny to any person within its jurisdiction, the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners submit the following statement to set forth pertinent facts in a chronological fashion.

On December 23, 1982, Bonnie J. Ledbetter gave birth to Baby Girl Ledbetter. On December 26, 1982, Ms. Ledbetter signed a final and irrevocable consent to the Santarelli's adoption of the baby before Judge Susan Gende in Rock Island, Illinois. Ms. Ledbetter refused to name the father.

On December 29, 1982, the Santarellis filed a petition to adopt the child which was heard the following day by Judge J.G. Townsend in Champaign County, Illinois. Finding Petitioners to be fit and proper, the court awarded them custody. From December of 1982 until October of 1983, the baby was at home with the Santarellis. The birth father made no attempt to contact the child.

James C. Ellison, the Respondent, became involved in this case in late January of 1983, by claiming to be the father of the child.

At the time of conception, Ms. Ledbetter was married to Robert W. Ledbetter, Jr., the presumptive father of

Baby Girl Ledbetter. On October 3, 1983, the trial court held that this presumption had been rebutted, that James Ellison was not proven unfit, that the Santarellis' Petition for Adoption was denied and custody was to be transferred to Ellison.

On December 9, 1983, the Santarellis were granted a Motion for Stay pending appeal and regained custody.

On June 21, 1984, the Fourth District Appellate Court, in Petitioners' first appeal, vacated, remanded, and held null and void the judgment of the trial court in this case because it was entered without jurisdiction over a necessary party, Robert W. Ledbetter, Jr. the presumed father of the baby.

On August 15, 1984, at the first hearing after return of the mandate, Petitioners filed a Motion for Change of Venue, which was heard and denied that day. The same day, James C. Ellison filed a counterclaim against Petitioners and Robert W. Ledbetter, Jr. praying for custody of the child.

The Petitioners answered the counterclaim, asserting two defenses. The first defense was that Robert W. Ledbetter, Jr. had contact, including sexual relations with the mother. The second defense was that Robert W. Ledbetter, Jr., had consented to the adoption and had executed the consent to adoption before a judge. On August 22, 1984, an Appearance, Disclaimer of Paternity and Response were filed on behalf of Robert W. Ledbetter, Jr. by *Ellison's attorney.*

A Motion to Set Aside this appearance and a Motion to Issue Summons and Order Personal Appearance of Robert W. Ledbetter, Jr. were made by Petitioners.

Respondent, Ellison, filed a Motion to Strike Petitioners' motions, which was allowed by the court.

A Motion for Entry of Order for the relief requested in the counterclaim was filed by Ellison. Petitioners filed objections to this motion.

During the hearing on motions on September 26, 1984, the trial court added Robert W. Ledbetter, Jr., as a new party respondent.

Petitioners' Motion for Leave to Take Discovery Deposition and to Issue Summons and Order Personal Appearance of Robert W. Ledbetter, Jr., was denied.

In a Judgment Order dated September 26, 1984, the Appearance, Disclaimer of Paternity and Response were held to be effective to prove the paternity of James C. Ellison and he, Ellison, was granted custody of the baby.

On September 27, 1984, Petitioners' Motion for Stay was denied and Petitioners gave Notice of Appeal.

On March 25, 1985, The Fourth District Appellate Court affirmed the trial court's ruling on remand. Petitioners then petitioned for Leave to Appeal to the Supreme Court of Illinois. Said petition for hearing was denied on October 2, 1985. (Appendix E) Motion for Reconsideration based on recent federal decisions applying 14th Amendment standards was denied January 30, 1986.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

State courts are applying varying tests and burdens of proof in determining custody issues in adoption cases. The results, all too frequently, are to the detriment of the children involved, and totally ignore their best interest by destroying family units and removing children from their psychological parents.

In the case at bench, the trial court denied the adoptive parents standing to challenge the hearsay statements of the presumed father in which he denied paternity. The same presumed father had earlier signed a consent to adoption by the Santarellis.

The effect of the denial of paternity was to reinstate a prior order awarding custody to the putative father and to break up the family unit of the adoptive parents. The test the trial court applied was that the adoptive parents must prove that the alleged father was unfit. The procedures used were a denial of due process and equal protection. First, the adoptive parents were denied standing to examine the presumed father. Secondly, the child's best interests were not considered. Third and finally, the court imposed a higher burden of proof on the psychological parents.

I. State Courts Are Applying Varying Tests and Burdens of Proof in Determining Custody Issues in Adoption Cases. The Results, All Too Frequently, Are to the Detriment of the Minor Children Involved, Totally Ignoring Their Best Interests by Destroying Established Family Units, and Removing Helpless Children From Their Psychological Parents.

State courts are being constantly confronted with the always difficult custodial issue that arises when an alleged biological father asserts a parental claim on a child who has already been placed with foster or adoptive parents. *In re Baby Girl M.*, 37 Cal. 3d 65 (1984), *Michael U. v. Jamie B.*, 39 Cal. 3d 787 (1985); *Hoy v. Willis*, 165 N.J. Super. 265, 398 A.2d 109 (1978); *Doe v. State of New Jersey*, 165 N.J. Super. 392, 398 A.2d 109 (1979).

Not infrequently, the alleged father asserts his claim at the behest of paternal grandparents who develop a familial interest after the birth of the child.

In California, when an alleged father proves his paternity and asserts a parental claim to custody, the burden is placed upon custodial parents to prove that such an award of custody would be *detrimental to the child.*

In other jurisdictions, such as New York (*see Lehr v. Robertson*, 463 U.S. 248 [1983]), the criteria for decision

is *the best interest of the child* with the burden shifted to the alleged biological father to prove that the changed custody would better serve the child's interest.

In the case of *In re Baby Girl M.*, 37 Cal. 3d 65 (1984) the California Supreme Court held that before the parental rights of a male who had casually impregnated a woman could be terminated, it must be shown that custodial award of the child to the male would be detrimental to the child.

A year later this same court in *Michael U. v. Jamie B.*, 39 Cal 3d 787 (1985) on similar facts, declined to rule on the constitutional rights which attach to the parent-child relationship existing between a child and her adoptive parents. A strongly divided court did note in two concurring separate opinions:

> The more I think about it, the more certain I am that the trouble with this case is not so much the fact-finding process, but this court's unfortunate misstep in *In re Baby Girl M.*, 37 Cal 3d 65 (1984). The sooner we rectify that mistake, the better. KAUS, J., concurring.
>
> *In re Baby Girl M.*, 37 Cal. 3d 65 (1984), established by a divided decision of this Court, that a casual inseminator could be declared a presumed father under the law and thus have the power to frustrate the unmarried mother's consent to adoption of her child by a qualified family and prevent the child from being reared in an environment with loving adoptive parents.
>
> This dramatically illustrates the fallacy of any test other than the best interest of the child. *Baby Girl M.* requires a finding that custody in the biological father would be detrimental to the child in order to deny him the same rights as a legally presumed father. MOSK, J & LUCAS J. concurring.

Although a plurality of three would have reversed *Baby Girl M.* the required majority was lacking.

The rights of non-biological, or psychological, parents received clear constitutional protection in California in 1973. In *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909 (1973), the court heard an adoptive couple's appeal when their child was removed without a hearing by the agency, one year after being placed with them. The court held that:

> The Fourteenth Amendment's guarantee of due process of law requires notice and opportunity to be heard before an individual suffers governmental deprivation of a fundamental interest.
>
> . . . .
>
> In determining whether a status or right is fundamental, the courts consider its effect in human terms and its importance to the individuals' life situation. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 144 [93 Cal. Rptr. 234, 481 P.2d 242].) Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mutual dependence set in ahead of official cachets, administrative or judicial. The placement initiates the " 'closest conceivable counterpart of the relationship of parent and child.' " (*Adoption of Barnett* (1960) 54 Cal. 2d 370, 377 [6 Cal. Rptr. 562, 354 P.2d 18].) To characterize enforced removal of the child as a "grievous loss" is to state the obvious.
>
> The governmental interest is weighty. The statutory system for relinquishment to the agency, for agency placement and agency approval, bespeaks a state policy to promote the child's welfare in derogation of all other values.

C.V.C., supra, 29 Cal. App. 3d at 916.

Although the notion that "blood is thicker than water" is still prevalent, Justice Friedman (*id.* at n. 7) made this revealing observation:

> Is [biological parenthood] more natural or more important than the mutual, reciprocal and continuous relation between parent and child, which may occur in adoptive or non-adoptive families, involved in the rearing of a child from infancy to maturity with all of the impact of day-to-day care and upbringing upon character, psychology, outlook, emotional make-up, and even biology which that entails? In this sense, does not nature 'do the work of nature' and create one a child who by nature is a stranger? In fact, in this sense, does not nature do the work of nature and create one a child who by nature is not a stranger? (tenBroek, *California's Adoption Law and Programs* (1955) 6 Hastings L.J. 261, 276.

The rights of psychological parents were again recognized in a California Federal District Court in 1985 in the case of *Brown v. County of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985). The same fundamental liberty interest was held to attach to a psychological parent-child relationship as to a biological parent-child relationship.

Once the standards of constitutional protection are brought into play, the parties must be treated equally. To avoid violating the Equal Protection Clause of the Fourteenth Amendment, it is essential to not give either the biological parent, the psychological parent or the child preference, one over the other. The same burden of proof must apply to each.

Further, to decide the future of a child, and the custodial placement in which the child will be forced to live, without consideration of the child's best interest, is a violation of due process and equal protection.

The pivotal factor must always be the best interest of the child.

In making a determination of the "best interests of the child," as referred to in the codes, the author of *New Trends and Requirements in Adoption Law and Pro-*

posals for Legislative Change, 49 S. CAL. L. REV. 10 (1975) provides some guidelines:

> Once consent to the adoption has been given, California law, unlike the law of some jurisdictions, generally protects the child's interest in remaining in an adoptive home that has become its real home . . . In an independent adoption, consent may be withdrawn only with court approval after a hearing. The court may permit withdrawal of the consent and return of the child to his natural parents only if, under all the circumstances, withdrawal is reasonable and in the best interests of the child. Since his provision gives no specific guidelines to the courts, it is recommended that language be added to the effect that withdrawal of consent by a parent should, as a rule, be denied once the child has become settled in the adoptive home.

Adoption of Barnett, 54 Cal. 2d 370, 6 Cal. Rptr. 562, 354 P.2d 18 (1960) held that:

> The rule of strict construction of our adoption statutes in favor of the natural parents . . . ., being inconsistent with the decisions of this court . . . ., as well as with Civil Code Section 4, is disapproved.

The court in *Adoption of Duckett*, 48 Cal. App. 3d 244, 121 Cal. Rptr. 574 (1975), citing *San Diego County Department of Public Welfare v. Superior Court*, 7 Cal. 3d 1, 101 Cal. Rptr. 541, 496 P.2d 453 (1972), stated that:

> The requirement of consent by a natural parent is not strictly construed in favor of the rights of the natural parent, but *instead is liberally construed in order to effect the object of the adoption statute in promoting the welfare of the children.* (emphasis added)

The nature of these cases are such that emotional factors favoring either the biological parent or the adopting parents are always present and pose an obstacle to properly analyzing the cases from the perspective of the

child. In order to analyze this question, a number of factors must be taken into consideration. The court, of course, has a great deal of discretion, not only in determining what these various factors should be, but also in weighing the effect of each factor. Clearly, factors such as comparative wealth and parental preference have no place in the best interests analysis. It is submitted that the following should be considered.

The author of *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y. U.L. REV. 446, 469, n. 127, specifically discusses certain factors with reference to the child's best interest and cites the Child Custody Act of Michigan wherein an attempt was made to isolate the factors for evaluation purposes:

> For example, in determining the child's best interests, judges might be directed to consider a variety of factors, including the wishes of the child (if of the age of reason), the length of time the child has been separated from the natural parents, the quality of the child's relationship with the contesting parties, and the testimony of psychiatrists or child psychologists on the potential effect on the child of alternative dispositions.
>
> At least one state statute has attempted to define the child's "best interests":
>
> "Best interest of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:
>
> (a) The love, affection and other emotional ties existing between the competing parties and the child.
>
> (b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
>
> (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted

under the law of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the competing parties.

(g) The mental and physical health of the competing parties.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

Child Custody Act of 1970, MICH. COMP. LAWS ANN., § 722.23 (Supp. 1976)

The purpose of discussing the various factors in detail is to provide assistance to this Court as to the impact of experts, writers and judicial decisions on the best interests question.

The factors submitted are certainly not intended to be all-inclusive and, by reason of the nature of the question, may be overlapping in nature.

A comparative analysis without the application of any parental preference is required. This analysis must be from the perspective of the child, not the biological parent or the adoptive parent. *Adoption of Michelle T.*, 44 Cal. App. 3d 699, 706-8, (1975) states:

> Recently, authorities have recognized the importance of the environment and the trauma to a young child caused by separation from its established home has

been viewed by the courts as a serious consideration in adoption cases. (*In re Adoption of Tachick* (1973) 60 Wis. 2d 540 [210 N.W. 2d 865, 869-871, and fns. 9 and 10 at p. 872]).

. . . .

Furthermore, in *Williams v. Neumann* (Ky. App. 1966) 405 S.W. 2d 566, the court stated that "[the petitioners have] attended every baby and childhood need and demand of [the child] from the fourth day of her life when she could neither focus her eyes nor raise her head. Up to this hour, according to this record, [she] has known no other mother as she has never seen her natural mother. She is now three and one-half years old and talking. She cannot be suddenly transplanted like a dogwood tree without running serious and dangerous risk of frustration and bewilderment." (*Id.* at p. 557). The court concluded that denial of the petition must be reversed and placed the child with the petitioners. . . .

Furthermore, the concept of "best interest" presents a relative standard. The question is not whether a particular set of circumstances is in the best interest of the child, but whether a particular set of circumstances relative to an alternative set of circumstances is in the best interest of the child. In this case, the alternative presented is commitment of the child to the Department in order that "adoptive or other suitable plans" may be arranged. While we recognize the difficulty the Department would have in submitting more definite plans, we conclude that the alternative presented places the court in a difficult position. It is asked to speculate on the future placement and to trust that it might be better than the home provided by petitioners. Although the court is powerless to predict future events which may bear on T.'s welfare, it has nevertheless, by its ruling in favor of the Department, affected the immediate continuity of the child-parent relationship.

Goldstein proposes refining the "best interest of the child" to a test which provides for "the least detrimental available alternative for safeguarding the child's growth and development" (*Id.* at p. 53). The

> least detrimental alternative "is that specific placement . . . . which maximizes, in accord with the child's sense of time and on the basis of short term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuing basis a relationship with at least one adult who is or will become his psychological parent." (*Id.* at p. 53). The authors thus suggest that it may be wiser to favor a situation certain, which may not be totally satisfactory, than to engage in predictions of future events which may or may not be in the 'best' interest of the child.

Adoption of Michelle T., 44 Cal. App. 3d 699, 706-8 (1975)

By far the most important issue is the detriment that befalls the child when it is uprooted from the home, and the attachments to the psychological parents are broken. It is now recognized that these attachments form to such a level by age three months.

The syndrome that follows the disruption is anaclytic depression. Experts agree that the impact of such a loss will be felt in varying degrees throughout the individual's life. Expert testimony will be required to present to the court the immediate impact, and the symptoms that appear; i.e. regression of verbal skills, motor skills, sleep loss, refusal of food, suppression of the immune system, bowel upset, general failure to thrive, lack of trust, refusal to form new attachments, repeated respiratory infections, etc. The intensity of these symptoms is directly proportional to the intensity of the reciprocal attachments between child and parent.

In the instant case the Illinois courts imposed the requirement that the alleged father be shown to be unfit. Under the constraints of the trial court this proved to be an impossible burden for the adoptive parents. The question of the best interest of the young girl was ignored, and she was removed from the only home she had known.

More and more the federal courts are holding that the best interests of minor children must be taken into account in these and related matters. *See, e.g., Brown v. County of San Joaquin*, 601 Fed. Sup. 653 (E.D. Cal. 1985). "The lodestar for any permanent plan for [the child] is her best interest."; *Polovchak v. Meese*, 744 F.2d 731 at 736 (1985); *Quillion v. Walcott*, 434 U.S. 246, 254 (1978), "[U]nder the circumstances of this case appellant's substantive rights were not violated by application of a 'best interests of the child' standard."

It is argued that the fundamental rights of young children to continue in a stable and nurturing home environment, with parents who are able and willing to provide for their material and psychic needs, is a federally protected right which must be given paramount consideration in determining the child's custody. This was not done in this case.

II. The Trial Court Denied the Adoptive Parents Standing to Challenge the Hearsay Statements of Robert W. Ledbetter, Jr., the Presumed Father, in Which He Denied Paternity.

The fundamental due process rights of Mr. and Mrs. Santarelli were violated when they were denied standing by the trial court to cross-examine the husband, Mr. Ledbetter, on this hearsay denial that he was the father of the minor child. The court admitted the written hearsay statement of Mr. Ledbetter to the extreme prejudice of the Santarellis' petition for adoption.

The court further denied Petitioners' motions to take Mr. Ledbetter's deposition and to request his personal appearance at trial.

The hearsay statement was taken and notarized by counsel for James C. Ellison, the alleged father and Respondent in the trial court.

The failure of the trial court to grant standing to Petitioners in that proceeding impermissibly abridged their right to due process under the fourteenth amendment.

> Reality controls; the emotional sustenance and enrichment, the very sense of self, derived from an intimate relationship with one's child cannot be discounted by the niceties of the relationship's creation . . . .
>
> . . . [T]he court concludes that the foster family relationship is sufficiently similar to other familial relationships held by the Supreme Court to be entitled to constitutional protection. The court reaches this conclusion because the foster parent-foster child relationship has precisely the same form and content as a healthy biological parent-child relationship and in the face of reality, the circumstances of its creation are immaterial.

Brown v. County of San Joaquin, 601 F. Supp. 653, 664-5 (E.D. Cal. 1985).

The above-cited case concerned a foster child. However, a child placed at birth for adoption would form the same psychological ties with his caretakers. From the child's perspective, foster parents, adoptive parents and biological parents would be indistinguishable. Reciprocally, all three types of parents would have the same bond with the child.

Because a familial relationship has been established, the psychological adoptive parents must be given a voice in court. "[I]t is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974)." [*Quilloin v. Walcott*, 434 U.S. 246, 255 (1977)]. This Court has already held that the constitutional protection afforded families stems not only from biology, but also from "the emotional attachments that derive from the intimacy of daily association, and from the role it [family relationship] plays in 'promoting a way of life' through the instruction of children," *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) citing *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972). *See also Caban v.*

Mohammed, 411 U.S. 380 (1979) and *Lehr v. Robertson*, 463 U.S. 248 (1982) wherein this court protects family relationships based on actual care and contact between parents and children.

CONCLUSION

There is significant variance among the courts as to the relative rights of alleged or non-presumed fathers and their offspring. In an effort to preserve the fundamental parental rights of these fathers, some states have established guidelines that infringe upon the federally protected rights of the psychological parents and children. The decision of the courts below in this case substantially ignored the best interests of the child and removed her from the loving care of adoptive parents who had cared for her since birth.

Petitioners contend that the adoptive parent-child relationship is protected by the guarantees afforded by the United States Constitution and request that this Court address the issues raised by this case and provide guidance as to the application of the constitution to these children who so desperately need its shelter.

For these reasons a Writ of Certiorari should issue to review the order of the Illinois Supreme Court.

Respectfully submitted,

CHRISTIAN R. VAN DEUSEN
(Counsel of Record)
CHRISTIAN R. VAN DEUSEN, INC.
615 Civic Center Drive West, #300
Santa Ana, CA 92701
(714) 547-6226

TEPPER & GWINN
(Co-Counsel)
P.O. Box 548
Urbana, Illinois 61801
(217) 367-5406
For Petitioners

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

No. 82-A-98

IN RE: THE ADOPTION OF
BABY GIRL LEDBETTER, A Minor,

ROBERT DENNIS SANTARELLI and
KAREN SUE SANTARELLI,
Petitioners,

vs.

JAMES C. ELLISON,
Respondent, Counter-Petitioner,

vs.

ROBERT DENNIS SANTARELLI and
KAREN SUE SANTARELLI,
Counter-Respondents,

and

ROBERT W. LEDBETTER, JR.,
Respondent.

[Filed Sept. 26, 1984]

JUDGMENT ORDER

THIS CAUSE coming on for hearing this 26th day of September, 1984, on the Motion for Entry of Order heretofore filed by Respondent-Counter-Petitioner, JAMES C.

ELLISON, and appearing thereat are ROBERT DENNIS SANTARELLI and KAREN SUE SANTARELLI, by their attorney, John Gwinn, and JAMES C. ELLISON, personally and by this attorney, Larry D. Maneke, and the Guardian-ad-litem, Larry R. Silkwood, appearing, and after arguments of counsel for the parties hereto and considering the evidence, the Court finds that the Appearance, Disclaimer of Paternity, and Response to the Counter-Petition of James C. Ellison which has been filed by Robert W. Ledbetter, Jr., which said document is a true, valid, genuine, and effective as an appearance in this cause by Robert W. Ledbetter, Jr. and said document is effective for the purposes as set forth in it and as directed by the Mandate of the Appellate Court of the Fourth Appellate District of the State of Illinois and should be allowed and entered.

The Court further finds that the Respondent-Counter-Petitioner, JAMES C. ELLISON, is entitled to the relief prayed for in his Counter-claim herein filed and that the Judgment of the Court entered October 31, 1983 should be affirmed and custody of the child known as Baby Girl Ledbetter returned to the natural father, JAMES C. ELLISON, and it is so ordered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

A. That the Appearance, Disclaimer of Paternty and Response filed herein by Robert W. Ledbetter, Jr. is a true, valid, genuine and effective appearance in this cause and is effective for the purposes set forth in said Appearance, Disclaimer of Paternity and Response and as directed by the Mandate of the Appellate Court of the Fourth Appellate District of the State of Illinois and is allowed.

B. That the relief prayed for in the Counter-claim filed herein by Respondent-Counter-Petitioner, JAMES C. ELLISON, is granted and the Judgment of this Court

entered on October 31, 1983 is affirmed and custody of the child known as and called Baby Girl Ledbetter is granted and awarded to the natural father, JAMES C. ELLISON, instanter.

C. In the event that custody of the Minor Respondent Baby Girl Ledbetter has not earlier been provided to James C. Ellison by Robert Dennis and Karen Sue Santarelli, they are ordered and directed to cause the Minor Respondent Baby Girl Ledbetter to be presented into open court at Courtroom H, Champaign County Courthouse, Urbana, Illinois, at 9:00 A.M. on Wednesday, October 3, 1984, so that the custody order here made may then be accomplished.

DATED: September 26, 1984

ENTER: /s/ [Illegible]
Judge

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

No. 4-84-0698

IN RE: THE ADOPTION OF BABY GIRL LEDBETTER,
ROBERT DENNIS SANTARELLI and KAREN SUE SANTARELLI,
Petitioners-Appellants,

v.

JAMES C. ELLISON,
Respondent-Appellee.

Appeal from Circuit Court County of Champaign

No. 82A98

Honorobale John G. Townsend, Judge Presiding

[Filed Mar. 25, 1985]

PRESIDING JUSTICE GREEN delivered the order of the court:

On June 21, 1984, this court vacated an order of the circuit court of Champaign County finding respondent was the natural father of Baby Girl Ledbetter, and not unfit, and awarding custody of her to him. The order was vacated because the presumptive father, Robert Led-

better, a necessary party, was not notified of the proceedings. Our opinion stated in part:

> "For the foregoing reasons, the judgment of the circuit court is vacated and the case is remanded for further proceedings not inconsistent with the views expressed in this opinion. If upon service of summons, Robert Ledbetter fails to appear or file a responsive pleading, the trial court is directed to affirm the judgment heretofore entered." *In re Adoption of Baby Girl Ledbetter* (1984), 125 Ill. App. 3d 306, 309, 465 N.E.2d 962, 964.

On remand, respondent amended his pleading, naming Ledbetter as a party. Subsequently, Ledbetter filed a verified appearance, disclaimer of paternity, and response in which he (1) submitted to the jurisdiction of the court, (2) waived the right to have summons or further notice served upon him, (3) consented to all orders of the court including a possible adoption, (4) stated that he believed he could not be Baby Girl Ledbetter's father, (5) consented to the court's finding that he was not her father, and (6) claimed no parental rights in regard to the child. On September 26, 1984, the court accepted and reinstated its original order awarding custody to respondent.

Petitioners, the proposed adoptive parents, argue the trial court erred in denying their motion for change of venue, in not disqualifying respondent's attorney because of a conflict of interest, in denying their motions for discovery and to compel Ledbetter's personal appearance, and in accepting the appearance, disclaimer of paternity, and responses as evidence of paternity. We affirm.

Our disposition of each of petitioners' contentions depends largely on the intent of our mandate upon which the case was remanded. Clearly, that intent was to give Robert Ledbetter who had been married to the mother of Baby Girl Ledbetter at the time of her conception, the

opportunity to assert any rights he might wish to assert and, if so, to be heard. While the express terms of the mandate required confirmance of the appealed order only if Robert Ledbetter, after being served, failed to appear and plead responsively, the obvious intent was that the previous order should also be confirmed, if as here, Ledbetter appeared and filed responsible pleadings but disclaimed any interest in the matter. Accordingly, upon the record presented, the trial court was mandated to confirm the prior order and properly did so.

Prior to any hearing in accord with the appellate court's decision, petitioners filed a motion for a change of venue alleging prejudice on the part of the trial court. (Ill. Rev. Stat. 1983, ch. 110, par. 2-1001(a)(2).) The trial court denied the motion. Petitioners argue that their right to a change of venue was absolute since it was filed in a timely fashion, and our mandate vitiated the prior proceedings. Respondent counters that our mandate did not vitiate the prior proceedings particularly under the circumstances whereby Robert Ledbetter disclaimed any interest in the outcome of the case. We agree with respondent.

Where a reviewing court reverses and remands without specific directions, the judgment reversed is completely abrogated and the cause stands as if no trial has occurred. (*In re Marriage of McMahon* (1980), 82 Ill. App. 3d 1126, 403 N.E.2d 730). When that has happened, a motion for change of venue from the judge based upon general allegations of prejudice is timely even though that judge had previously ruled on a matter of substance in the prior proceedings. (*United Nuclear Corp. v. Energy Conservation Devices, Inc.* (1982), 110 Ill. App. 3d 88, 441 N.E.2d 1163). Here, because of the directions given and limited scope of the responsibility of the trial court on remand, the prior proceedings, in which the rights of those then parties were determined, were not abrogated. Thus, the usual rule that a motion for a

change of judge based upon general allegations of prejudice must be made before that judge has ruled on a matter of substance was applicable. (Ill. Rev. Stat. 1983, ch. 110, par. 2-1001(c); *Millburn Mutual Insurance Co. v. Glaze* (1980), 86 Ill. App. 3d 1055, 410 N.E.2d 295.) As the trial judge had previously ruled on many matters of substance, the motion for change of venue from the judge was properly denied.

Petitioners next argue that the court committed reversible error when it failed to disqualify respondent's attorney who prepared Ledbetter's appearance, disclaimer of paternity, and response. Petitioners argue respondent's counsel was representing conflicting interests. Respondent argues no conflict existed. Initially, we note that two documents entitled appearance, disclaimer of paternity, and response were filed. The first document stated it was prepared at the request of respondent's counsel. The second, although it was similar in content to the first, was not notarized by respondent's counsel. On its face it was an independent response. The record did not indicate otherwise. The trial court's order now on appeal indicated that the trial court was relying on this document.

Furthermore, the interests of Ledbetter and respondent are not necessarily in conflict here. (*See In re Estate of Kapraun* (1959), 21 Ill. App. 2d 231, 242, 157 N.E.2d 700, 705.) Even if the interests were in conflict, they could properly agree to single representation. (*Hutchison v. Woodstock Community Unit School Dist. No. 200* (1978), 66 Ill. App. 3d 307, 314, 384 N.E.2d 382, 387.) In any event, ordinarily the only persons who could complain of the conflict would be the clients of the attorney alleged to be in conflict, respondent and Robert Ledbetter.

The propriety of the order on appeal was not rendered erroneous by any conflict of interest by any counsel.

During the proceedings on remand, petitioner made a request to take the depositions of Robert Ledbetter and demanded his appearance. The court did not err in denying petitioners' request. As we have mentioned, in view of our interpretation of our previous mandate, Robert Ledbetter's appearance consenting to the court's previous action left the court with no factual issue to determine. The only apparent purpose of deposing or examining Robert Ledbetter would be to obtain further evidence on the question of the paternity of the child. Because of the position taken by Robert Ledbetter, that issue was beyond the scope of the mandate and foreclosed.

Finally, petitioners assert that the court should not have accepted Robert Ledbetter's appearance, disclaimer of paternity, and response, the documents by which he indicated that he had no interest in the case. Petitioners contend that the denial of paternity was hearsay. These documents were not admitted as evidence of paternity but as pleadings stating Ledbetter's position in the case. As such, they were proper.

Finding no error, we affirm.

Affirmed.

McCULLOUGH and TRAPP, JJ., concur.

APPENDIX C

IN THE SUPREME COURT OF ILLINOIS

No. 61787

IN RE: ADOPTION OF BABY GIRL LEDBETTER,

ROBERT DENNIS SANTARELLI and
KAREN SUE SANTARELLI,
Petitioners-Appellants,

vs.

JAMES C. ELLISON,
Respondent-Appellee,
Cross-Appellant.

Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth District

Trial Court No. 82-A-98

Appellate Court No. 4-84-0698

There Heard on Appeal From the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois

---

Honorable John G. Townsend, Judge Presiding.

PETITION FOR LEAVE TO APPEAL
by Robert Dennis Santarelli and
Karen Sue Santarelli, Petitioners-Appellants

TEPPER & GWINN
Attorneys for Petitioners-Appellants
John Gwinn of counsel
209 West Elm
Urbana, IL 61801
217-367-5406

IN THE SUPREME COURT OF ILLINOIS

IN RE: ADOPTION OF BABY GIRL LEDBETTER,

ROBERT DENNIS SANTARELLI and
KAREN SUE SANTARELLI,
Petitioners-Appellants,

vs.

JAMES C. ELLISON,
Respondent-Appellee,
Cross-Appellant.

Trial Court No. 82-A-98

Appellate Court No. 4-84-0698

On petition for Leave to Appeal from the Appellate Court of Illinois, Fourth District. There heard on Appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois. Honorable J. G. Townsend, Trial Judge.

PETITION FOR LEAVE TO APPEAL

Robert Dennis Santarelli and Karen Sue Santarelli, through their attorneys, Tepper & Gwinn, petition this court to grant their leave to appeal from a judgment of the Appellate Court of Illinois, Fourth District, entered on March 25, 1985, affirming the judgment of the Circuit Court of Champaign County which denied their petition for adoption and awarded custody of Baby Girl Ledbetter to Respondent.

POINTS RELIED UPON FOR REVERSAL

I. THE APPELLATE COURT HAS AFFIRMED THE DECISION OF THE TRIAL COURT ON REMAND, DESPITE THE FACT THAT THE EVENTS WHICH OCCURRED AFTER REMAND WERE NOT THOSE COVERED BY THE DIRECTIONS GIVEN ON FIRST APPEAL.

II. THE APPELLATE COURT FAILED TO REVERSE THE TRIAL COURT'S ERRONEOUS DENIAL OF PETITIONER'S MOTION FOR CHANGE OF VENUE.

III. THE APPELLATE COURT HAS AFFIRMED WHAT WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT: THE DENIAL OF THE FUNDAMENTAL DUE PROCESS RIGHT OF PETITIONERS' MOTION TO TAKE THE DEPOSITION AND REQUEST THE PERSONAL APPEARANCE OF ROBERT W. LEDBETTER, JR., THE HUSBAND.

IV. THE APPELLATE COURT MISAPPREHENDED THE LEGAL EFFECT OF ROBERT W. LEDBETTER'S JUDICIAL CONSENT TO ADOPTION AND WAS IN ERROR IN AFFIRMING THE ADMISSION OF HIS DISCLAIMER OF PATERNITY AND RESPONSE WHICH WAS HEARSAY EVIDENCE.

STATEMENT OF FACTS

For purposes of clarity, submit the following statement which attempts to set forth pertinent facts in a chronological fashion.

On December 23, 1982, Bonnie J. Ledbetter gave birth to Baby Girl Ledbetter. No father was named on the birth certificate. On December 26, 1982, Ms. Ledbetter signed a final and irrevocable consent to the Santarelli's

Adoption of the baby before Judge Susan Gende in Rock Island, Illinois. Ms. Ledbetter refused to name the father.

On December 29, 1982, the Santarelli's filed a petition to adopt the child which was heard the following day by Judge J. G. Townsend in Champaign County, Illinois. Finding petitioners to be fit and proper, he awarded them custody. From December of 1982 until October of 1983 the baby was at home with the Santarelli's. Mr. Ellison made no attempt to contact the child during this period.

James Eilison, the respondent, became involved in this case in late January of 1983, by claiming to be the father of the child.

At the time of conception Ms. Ledbetter was married to Robert W. Ledbetter, Jr., making him the presumptive father of Baby Girl Ledbetter under Illinois law. On October 3, 1983 the trial court held that this presumption had been rebutted, that James Ellison was not proven unfit, that the Santarelli's Petition for Adoption was denied and that the custody was to be transferred to Ellison.

On December 9, 1983, the Santarelli's were granted a Motion for Stay of Judgment pending appeal and regained custody of the baby.

On June 21, 1984, The Fourth District Appellate Court, in petitioners first apepal, vacated, remanded, and held null and void the judgment of the trial court in this case because it was entered without jurisdiction over a necessary party, Robert W. Ledbetter, the husband of the mother of the baby girl and the presumptive father of Baby Girl Ledbetter. (Appendix to Appellant's Brief p. 29)

On August 15, 1984, at the first hearing after return of the mandate, Petitioners filed a Motion for Change of Venue (C4), which was heard and denied that day (C4). The same day, James C. Ellison filed a Counter-

claim against Petitioners and Robert W. Ledbetter, Jr., praying for custody of the child (C6).

The Petitioners filed a verified answer to the counterclaim, asserting two defenses. The first defense stated that Ledbetter had contact, including sexual relations, with the mother between the time stated in his response. The second defense stated that Ledbetter had consented to the adoption of said child by the Petitioners and had executed a consent to adoption by the Petitioners before a judge (C25). On August 22, 1984, an Appearance, Disclaimer of Paternity and Response was filed on behalf of Robert W. Ledbetter, Jr. by Ellison's attorney (C13-14).

A Motion to Withdraw this appearance (C30) and a Motion to Issue Summons and Order Personal Appearance (C33) of Robert W. Ledbetter, Jr. were made by Petitioners.

Respondent, Ellison, filed a Motion to Strike Petitioners' motions (38), which was allowed by the court.

A Motion for Entry of Order for the relief requested in the Counterclaim was filed by Ellison (C18). Petitioners filed objections to this motion.

During the hearing on motions on September 26, 1984, the trial court added Ledbetter as a new party respondent. Petitioners' Motion for Leave to Take Discovery Deposition (C43) and to Issue Summons and Order Personal Appearance of Ledbetter were denied (C46).

In a Judgment Order dated September 26, 1984, the Appearance, Disclaimer of Paternity and Response was held to be effective for the purposes set forth by Robert W. Ledbetter, Jr. and Ellison was granted custody of Baby Girl Ledbetter (C48).

On September 27, 1984, Petitioners' Motion for Stay of Judgment was denied and Petitioners gave Notice of

the Filing of an Appeal from the September 26, 1984 Judgment Order (C52).

On March 25, 1985, the Fourth District Appellate Court affirmed the trial court's ruling on remand. Petitioners now petition for Leave to Appeal to the Supreme Court of Illinois. (Appendix)

I. THE APPELLATE COURT HAS AFFIRMED THE DECISION OF THE TRIAL COURT ON REMAND, DESPITE THE FACT THAT THE EVENTS WHICH OCCURRED AFTER REMAND WERE NOT THOSE COVERED BY THE DIRECTORS GIVEN ON FIRST APPEAL.

The opinion of the Appellate Court on first appeal of this cause states, "If upon service of summons, Robert W. Ledbetter, Jr. *fails* to appear on file a responsive pleading, the trial court is directed to affirm the judgment heretofore entered." (Emphasis Added) According to the law of Illinois, "a trial court has no authority to act beyond the dictates of the mandate." *PSL Realty vs. Granite Investment Co.*, 86 Ill. 2d 291, 309, 423 N.E. 2d 896 (1981). On remand of this case Robert W. Ledbetter did not fail to file a responsive pleading, rather he filed an Appearance, Disclaimer of Paternity and Response. Under these circumstances, the court could not merely affirm, but was required to begin "further proceedings not inconsistent with the views expressed in this opinion." The opinion stated the Mr. Ledbetter was a necessary party to this suit. Once properly joined, a new configuration of parties existed and further proceedings were necessary to determine the respective rights of the Petitioners, the husband, and the putative father.

The Appellate Court's opinion on second appeal offers an alternative interpretation—that Robert W. Ledbetter was being given the opportunity to assert his rights *if he wished to*—as the "obvious intent" of the previous order. It is clear that despite any submerged intent an

order may be claimed to carry, "where a court remands a cause with specific directions, they must be followed exactly." *Burns Constr. Co. vs. Interlake Inc.*, 125 Ill. App. 3d 26, 29, 465 N.E. 2d 639 (1984) (Emphasis Added). In the present case the court's directions were in anticipation of a situation which never arose. Given the situation which did occur, the trial court on remand did not have authority to simply affirm. The Appellate Court thus erred in affirming the trial court's ruling.

II. THE APPELLATE COURT FAILED TO REVERSE THE TRIAL COURT'S ERRONEOUS DENIAL OF PETITIONER'S MOTION FOR CHANGE OF VENUE.

After the Appellate Court's first opinion vacating and remanding the trial court's order and prior to any further hearing, petitioners moved for a change of venue alleging prejudice of the trial judge. This motion was improperly denied since, as stated in *United Nuclear Corp. vs. Energy Conservation Devices, Inc.*, 110 Ill. App. 3d 88, 441 N.E. 2d 1163 (1982), "upon remand of the present case, however, the trial court's rulings will have no effect since a reversal abrogates the judgment or decree reversed and leaves the case as it stood prior to the entry thereof. (citations omitted) Thus, no substantive rulings will have been entered, and either party may at that point apply for a change of venue." Id. at 88.

In the case at bar the prior judgment was abrogated because the court found Robert W. Ledbetter, Jr. to be a necessary party and thus found the order entered to be null and void. The Appellate Court's second opinion states that the trial court on remand had limited responsibilities because of the directions given. This would only be true if the situation anticipated by the directions actually came about. It did not.

Since the trial court on remand denied Petitioner's timely and properly written motion for change of venue,

all orders entered by that court following this improper denial on August 15, 1984 are void. *Little vs. Newell*, 14 Ill. App. 3d 564, 302 N.E. 2d 739 (1973). The Appellate court thus erred in affirming the denial of the motion for change of venue and the trial court's subsequent orders|

III. THE APPELLATE COURT HAS AFFIRMED WHAT WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT: THE DENIAL OF THE FUNDAMENTAL DUE PROCESS RIGHT OF PETITIONERS' MOTION TO TAKE THE DEPOSITION AND REQUEST THE PERSONAL APPEARANCE OF ROBERT W. LEDBETTER, JR., THE HUSBAND.

The trial court abused its discretion in denying Petitioners' Motion to take the Discovery Deposition of Robert W. Ledbetter, Jr. Discovery is given a broad and flexible scope in Illinois. *Sarver vs. Barrett Ace Hardware*, 63 Ill. 2d 454, 349 N.E. 2d 28 (1976). Even under a more narrow view of discovery, the taking of a deposition of a newly added necessary party would be allowed. Robert W. Ledbetter signed a judicial Final and Irrevocable Consent to the Adoption of Baby Girl Ledbetter by the Petitioners. By denying Petitioners the opportunity to question Mr. Ledbetter, the court denied Petitioners procedural due process.

The trial court further denied Petitioners the opportunity to cross examine Mr. Ledbetter. While the court clearly found his Appearance, Disclaimer of Paternity and Response to be effective with regards to Mr. Ledbetter's rights, in so doing the court effectively foreclosed Petitioners' rights with regards to the child. The order of the trial court rested upon the Disclaimer and yet the court did not allow any cross examination of the husband, Mr. Ledbetter. The fundamental principles of due process are violated when a party is denied cross examination concerning a hearsay document which is effectively decides the case against them.

The Santarellis' Petition for Adoption rises or falls on whether the strong legal presumption that Mr. Ledbetter is the father has been rebuttted. For the trial court to decide this case without allowing Petitioners an opportunity for discovery on the document on which it relies is an abuse of discretion and a fundamental denial of due process. It was error for the Appellate Court to affirm such a finding.

IV. THE APPELLATE COURT MISAPPREHENDED THE LEGAL EFFECT OF ROBERT W. LEDBETTER'S JUDICIAL CONSENT TO ADOPTION AND WAS IN ERROR IN AFFIRMING THE ADMISSION OF HIS DISCLAIMER OF PATERNITY AND RESPONSE, WHICH WAS HEARSAY EVIDENCE.

The appellate court opinion does not deny that the Appearance, Disclaimer of Paternity and Response of Robert W. Ledbetter as offered is an item of hearsay. Its position, however, is that this document was admitted as a pleading rather than as evidence.

A presumption exists that Robert W. Ledbetter is the natural father of Baby Girl Ledbetter under Ill. Rev. Stat., ch. 40, par. 1405 (1983). This presumption can only be overcome by clear and irrefragable proof. *Orthwein vs. Thomas*, 127 Ill. 554, 21 N.E. 2d (430) (1889). If the Appearance, Disclaimer of Paternity and Response of Robert W. Ledbetter was not admitted as evidence of his non-paternity, then no evidence whatsoever was offered on this point. Hence the presumption carries that Ledbetter, the husband, was the father of the Baby Girl.

As the Appellate Court affirmed an order vesting paternity with James E. Ellison, logic leads us to one of two conclusions. One, the Appellate Court erred in not ruling that Robert W. Ledbetter is the natural father as prescribed by the presumption; or two, the Appearance, Disclaimer of Paternity and Response was admitted as evi-

dence to rebut this presumption, in which case the Appellate Court erred in affirming a ruling based entirely on inadmissible hearsay evidence. In either case, the Supreme Court should review the decision of the Appellate Court and reverse it.

Robert W. Ledbetter has given his judicial consent to the petitioners, the Santarellis', for the adoption of Baby Girl Ledbetter. If the presumption carries and Mr. Ledbetter is found to be the child's father, the Petitioners, the Santarellis', receive custody of Baby Girl Ledbetter. If, however, this presumption is found to be rebutted solely through hearsay evidence, the Petitioners will lose custody without even the minimal procedural due process of being allowed to cross examine Mr. Ledbetter on the subject of a hearsay document which has taken away all of their rights as petitioners for adoption.

CONCLUSION

For the reasons expressed herein, Petitioners prays that this court will grant this petition for leave to appeal, and, upon a full hearing of this case, will reverse the judgment of the Appellate Court and grant judgment in favor of Petitioners or, in the alternative, grant a new trial for the obvious errors occurring in the trial court which the Appellate Court has affirmed.

Respectfully Submitted,

/s/ John Gwinn
Attorney for Petitioners

Tepper & Gwinn
209 W. Elm
Urbana, Il. 61801
(217) 367-5406

APPENDIX D

IN THE SUPREME COURT OF ILLINOIS

No. 61787

IN RE: ADOPTION OF BABY GIRL LEDBETTER,

ROBERT DENNIS SANTARELLI *and*
KAREN SUE SANTARELLI,
Petitioners-Appellants,

vs.

JAMES C. ELLISON,
Respondent-Appellee.

Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth District

Trial Court No. 82-A-98

Appellate Court No. 4-84-0698

There Heard on Appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois

---

Honorable John G. Townsend, Judge Presiding.

SUPPLEMENTAL
PETITION FOR LEAVE TO APPEAL

by Robert Dennis Santarelli and
Karen Sue Santarelli, Petitioners-Appellants

Tepper & Gwinn
Attorneys for Petitioners-Appellants
209 West Elm
Urbana, IL 61801
217-367-5406

POINTS RELIED UPON FOR REVERSAL

I. PETITIONERS FAMILY RIGHTS ARE FOURTEENTH AMENDMENT PROTECTED LIBERTY INERESTS WHICH WERE TERMINATED WITHOUT DUE PROCESS.

II. THE LEGISLATURE INTENDED PARTIES SUCH AS PETITIONERS TO HAVE STANDING TO DEPOSE AND CROSS-EXAMINE WITNESSES IN A PATERNITY ACTION.

III. DUE PROCES AND THE LEGISLATIVE INTENT EXPRESSED IN THE ADOPTION ACT REQUIRE A SPECIFIC FINDING OF THE 'BEST INTEREST OF THE CHILD' BEFORE TERMINATION OF THE PARENT-CHILD RELATIONSHIP

I. PETITIONERS FAMILY RIGHTS ARE FOURTEENTH AMENDMENT PROTECTED LIBERTY INTERESTS WHICH WERE TERMINATED WITHOUT DUE PROCESS.

The concept of liberty under the Fourteenth Amendment was intended to be broad and gather new meaning as our society changed. *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972). This liberty interest has been extended to the family. "The court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State . . . The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of a family . . ." *Robert v. United States Jaycees,* —— U.S. ——, 104 S.Ct. 3244 at 3250, 82 L.Ed. 2d 462 (1984). Although the United States Supreme Court has not yet found it necessary to reach the issue of formally extending due process protection to foster or adoptive families, it has considered the question and stated:

> "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals.

Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 97 S.Ct. 2094 at 2109, 2110, 53 L.Ed.2d 14 (1977).

A Federal Court has recently considered this line of cases and taken the final step of applying their thinking to a situation analogous to this case at bar. In *Brown v. County of San Joaquin*, 601 F.Supp. 653 (1985), a foster mother had cared for a little girl during the first 3¼ years of her life, only to have her petition for adoption denied by San Joaquin County Human Services Agency. The United States District Court, E.D. California, took this opportunity to hold that this mother and child's "family" was as worthy of constitutional protection as a biological family. The court stated, "Thus the ultimate question: is a relationship with the form and function of a biological family entitled to the legal protections granted to a biological family despite the fact that the relationship is entirely a creature of state law? This court concludes that it is." Id. at 664. The court expressed its reasoning behind this conclusion as follows:

> "It is artificial to treat a relationship that time and events have transformed into the most profound relationship known to mankind—mother and child—as the purely legal relationship it originally was. Real-

> ity controls; the emotional sustenance and enrichment, the very sense of self, derived from an intimate relationship with one's parent or one's child cannot be discounted by the niceties of the relationship's creation. In a series of cases decided since *Smith v. OFFER*, The Supreme Court has made it clear that the touchstone of protectible family rights is not nice legal distinctions or even simple biology, but the reality of family life. . . . In short, the court concludes that the foster family relationship is sufficiently similar to other familial relationships held by the Supreme Court to be entitled to constitutional protection. The court reaches this conclusion because the foster parent-foster child relationship has precisely the same form and content as a healthy biological parent-child relationship, and in the face of reality, the circumstances of its creation are immaterial." Id. at 664, 665.

In the case now under the consideration of this court, a family relationship is presented, as strong and as real as the finest examples of biological families, and all that is asked is that the same rights be accorded this family as in the *Brown* case.

At the circuit court trial to determine whether the relationships comprising this family were to be terminated, a necessary party, Robert W. Ledbetter, the presumptive father of the child, was not made a party. Later, after an appeal, he was added by an Entry of Appearance. Petitioners were denied the opportunity to take this man's deposition. Petitioners were denied the opportunity to cross examine him. The trial court, in fact, ordered custody to the Respondent based upon Mr. Ledbetter's Appearance, Disclaimer of Paternity and Response, without allowing any questioning of the presumptive father who never appeared in court.

Clearly, the members of the family unit made up of petitioners and the child they have raised for over twenty

(20) months since three days after her birth, are deserving of the constitutional protection of due process of law. Equally clearly, due process was not afforded them. This court should, therefore, reverse the decision of the Appellate Court.

II. THE LEGISLATURE INTENDED PARTIES SUCH AS PETITIONERS TO HAVE STANDING TO DEPOSE AND CROSS-EXAMINE WITNESSES IN A PATERNITY ACTION.

An anomaly associated with the denial of Petitioner's due process rights was the trial court's treatment of petioners as less than fully interested parties in the paternity and adoption proceedings. This was against the clear intent of the Illinois Legislature and contributed to the errors of denying petitioners the opportunity to depose or cross examine the husband Robert W. Ledbetter.

The continuing evolution of Illinois law shows an intent held by our legislators that parties such as pettioners have full standing in a paternity action concerning a child for whom they have cared. Ill. Rev. Stat. 1983, Ch. 40, Par. 2507, Sec. 7(a) of the Parentage Act of 1984, effective July 1, 1985, states, "An action to determine the existence of the father and child relationship . . . may be brought by the child; the mother; a pregnant woman; *any person or public agency who has custody of, or is provided or has provided financial support to, the child*; or a man presumed or alleging himself to be the father of the child or expected child." (emphasis added). Further, a judgment under the Parentage Act" may be enforced . . . by any party or any person or agency that has furnished or may furnish financial assistance or services to the child." Ill. Rev. Stat. 1983, Ch. 40, Par. 2515.

Since "any person . . . who has . . . provided financial support for the child" may institute a paternity action or

enforce an order therefrom, certainly those whom the child considers mother and father and have cared for the child since just after birth, both financially and in every other way, have standing to question a pleading by the husband, dispensing with what would otherwise be the long standing Illinois strong presumption of paternity by the husband.

The trial court did not extend petitioners the standing clearly intended by the legislature when it denied the motions to take the deposition of and compel the appearance of Robert W. Ledbetter. The petitioners, despite their standing in this suit, were not allowed to question Mr. Ledbetter's Appearance, Disclaimer of Paternity and Response. Because of this, this hearsay document was allowed to stand as the only evidence weighing against the presumption that Ledbetter was the child's natural father. This error should be reversed.

III. DUE PROCESS AND THE LEGISLATIVE INTENT EXPRESSED IN THE ADOPTION ACT REQUIRED A SPECFIC FINDING OF THE "BEST INTEREST OF THE CHILD" BEFORE TERMINATION OF THE PARENT-CHILD RELATIONSHIP.

"The best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act." Ill. Rev. Stat. 1983, Ch. 40, Par. 1525; Sec. 20a of the Adoption Act. Through the use of the above-quoted language, the legislators of the State of Illinois made it clear that the "paramount" consideration in any adoption proceeding was the best interest of the child to be adopted. Both the trial and Appellate courts failed to make express findings as to where those interests lie in the present case. The family unit brought together, nourished and established by and between petitioners and the child who knows them as parents constitutionally entitles its members to certain

judicial protections before it can be disassembled. At the very least, due process requires a finding of where the child's best interests lie as some indication that the court is attempting to honor the express intentions of the legislature in enacting the Adoption Act. The omission of such a finding in this case was a denial of due process to petitioners, and an error requiring reversal.

The "best interest of the child" standard is used in Illinois to determine proper custody between unmarried parents. It has been applied in habeas corpus proceedings, under the Probate Act, and under the Illinois Dissolution and Marriage Act. See *In re Custody of Bourey*, 82 Ill. Sec. 852, 127 Ill. App. 3d, 530 at 532, 3, 469 N.E. 2d 386 (1984).

Many of our sister states currently require a specific finding with regards to the "best interest of the child" before a putative father can acquire custody of a child. Texas and Michigan are representative examples.

Under Texas law it has been held that a putative father cannot obtain custody of his child in the absence of an express finding that to do so would be in the child's best interest. *In re Baby Girl S.*, 628 S.W. 2d, 261 (1982).

A Michigan Statute, M.S.A. Sec. 27.2178 (555.39) states:

> "If the putative father is one who has not established any custodial relationship with the child or who did not provide any support or care for the mother during pregnancy or for either mother or child after the child's birth until notice of the hearing was served upon him, and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child

to grant custody to the putative father, the court shall terminate his rights to the child."

The application of a "best interests of the child" standard plainly accommodates first those rights most important in any child custody proceeding, those of the child. Further, this test does not violate the constitutional rights of the putative father. In *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L.Ed. 2d 511 (1978), an adoption was granted with the consent of the biological mother, despite the objection of the biological father, because the court found this disposiiton to be in the best interest of the child. In its affirmation of this decision, the U.S. Supreme Court stated with regards to possible violations of the biological father's due process rights,

> "We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant (putative father). Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child." Id. at 434 U.S. 255.

The court further rejected an Equal Protection claim in which the unwed father contended he should be measured by the same standard as is applied to a married father. The Court stated, "We think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the state could permisisbly give appellant less veto authority than it provides to a married father." id. at 434 U.S. 256.

The application of a "best interest of the child" standard and the requirement of specific findings in accordance therewith make it necessary to reverse the case at bar. It is undisputed that the best interest of Baby Girl Ledbetter was not served by removing her from the custody of the only parents she has ever known. James Ellison, the putative father, made no effort to establish a father-daughter relationship with the child prior to his appearance at the hearing for her adoption. He made no contact whatsoever with the child for the first 10 months of her life. "[T]he conduct of an unmarried parent in meeting the responsibility of establishing a significant relationship with the child and of providing for the child must be given sufficient weight. This factor in conjunciton with the many others must be recognized in determining the best interest of the child." *In re Custody of Dykhuis*, 86 Ill. Sec. 728, 131 Ill. App. 3d 371, at 375, 475 N.E. 2d 1107 (3d Dist. 1985). The Appellate Court in *In re Custody of Bourey*, 82 Ill. Sec. 852, 127 Ill. App. 3d 530, 469 N.E. 2d 386 (2d Dist. 1984), after consideration of the sister state decisions mentioned above, stated, "Thus, we conclude that the conduct of an unmarried parent in meeting the responsibility of providing for the child and of establishing a significant relationship with the child must be considered among the circumstances which the trial court must recognize in determining the best interest of the child." Id. at 127 Ill. App. 3d 534.

Clearly, when proper weight is given the conduct and character of the single putative father, the strength and depth of the parent-child relationship between petitioners and the daughter they have raised and cared for since birth, and the emotional well being and need for the security of the child about whom this revolves, this Court must recognize where the best interest of this child lies and accordingly, reverse the Appellate Court's decision.

CONCLUSION

For the reasons expressed herein, Petitioners pray that this court will grant this motion for leave to file supplemental petition for leave to appeal, and, upon a full hearing of this case, will reverse the judgment of the Appellate Court and grant judgment in favor of Petitioners or, in the alternative, grant a new trial for the obvious errors occurring in the trial court and return custody of Baby Girl Ledbetter from James Ellison to the adoptive parents, Dennis and Karen Santarelli.

Respectfully submitted,

_____

Attorney for Petitioners

TEPPER & GWINN
209 W. Elm
Urbana, IL 61801
(217) 367-5406

APPENDIX E

ILLINOIS SUPREME COURT
JULEANN HORNYAK, Clerk
Supreme Court Building
Springfield, Ill. 82706
(217) 782-2035

October 8, 1985

Mr. John Gwinn
Tepper & Gwinn
209 West Elm
Urbana, IL 61801

No. 61787—In re: Adoption of Baby Girl Ledbetter (Robert Dennis Santarelli, et al., petitioners, v. James C. Ellison, respondent). Leave to appeal, Appellate Court, Fourth District.

The Supreme Court to day DENIED the petition for leave to appeal in the above entitled case.

Miller, J., took no part.

The mandate of this Court will issue to the Appellate Court on October 23, 1985.

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

January 7, 1986

Christian R. Van Deusen, Esq.
615 Civic Center Drive West
Suite 300
Santa Ana, California 92701

Re: *Santarelli, et al.* v. *Ellison*

Dear Mr. Van Deusen:

Your typewritten petition for writ of certiorari and check in the amount of $200.00 sent from California via Federal Express on December 31, 1985, were delivered to this office January 2, 1986.

Pursuant to our telephone conversation on January 3, 1986, your petition and check are returned.

Very truly yours,

JOSEPH F. SPANIOL, JR.

By /s/ Francis J. Lorson
FRANCIS J. LORSON
Chief Deputy Clerk

FJL/dee
Enclosures
cc: John Gwinn, Esq.
Larry R. Silkwood
Ames & Manecke

APPENDIX G

[SEAL]

STATE OF ILLINOIS
SUPREME COURT CLERK
Supreme Court Building
Springfield 62706

JULEANN HORNYAK
Clerk of Court
(217) 782-2035

January 30, 1986

Mr. John Gwinn
Tepper & Gwinn
Attorneys at Law
209 West Elm
Urbana, IL 61801

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 61787—In re: Adoption of Baby Girl Ledbetter (Robert Dennis Santarelli, et al., petitioners, v. James C. Ellison, respondent).

Motion by petitioners for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion *denied.* Miller, J., took no part.

Motion by respondent to strike the motion by petitioners for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion *denied.* Miller, J., took no part.

JH:sdl

cc: Ames & Manecke (Larry Manecke)
Christian F. Van Deusen
Larry Silkwood

JULEANN HORNYAK, Clerk

Supreme Court, U.S.
FILED
APR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1554

In The

Supreme Court of the United States

October Term, 1985

IN RE: ADOPTION OF:
BABY GIRL LEDBETTER, a Minor,
ROBERT DENNIS SANTARELLI and
KAREN SUE SANTARELLI,

Petitioners,

v.

JAMES C. ELLISON,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

THOMAS JORDAN GALLAGHER
(Counsel of Record)
GALLAGHER, FUENTY & KLEIN
Attorneys at Law
155 North Third Street
DeKalb, Illinois 60115
Tel.: (815) 758-7491

AMES & MANECKE
(Co-Counsel)
139 East 1st Street
Coal Valley, Illinois 61240
Tel.: (309) 799-7366

For Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. Jurisdiction—Petition for Writ of Certiorari was Not Timely Filed	3
II. The Matters Attempted to be Raised by Petitioners have been rendered Res Judicata by the Prior Appeal in this Cause	4
III. The Rights of Natural or Putative Father are well established	6
IV. Petitioners Were Not Denied Due Process or Equal Protection At Any Stage In These Proceedings	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Brown v. County of San Joaquin, 601 F. Supp. 653 (E.D. Cal. 1985) 6

In Re: Adoption of Baby Girl Ledbetter, 125 Ill. App. 3d 306, 465 N.E.2d 962 (1984) 3, 10

Polorchak v. Meese, 774 F.2d 731 (7th Cir. 1985) 6

Quillion v. Walcott, 434 U.S. 246 (1978) 6

Rehbock v. Dixon, 458 F. Supp. 1056 (D.C. Ill. 1978) 7, 8

Rosenbaum v. Rosenbaum, 94 Ill. App. 3d 352, 49 Ill. Dec. 919, 418 N.E.2d 939 (1st Dist. 1981) 5

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 6

United States v. Healy, 376 U.S. 75 (1975) 11 L. Ed. 2d 527, 84 S.Ct. 553 3

STATUTES

ILL. REV. STAT. (1983), Ch. 40, Par. 1501 *et. seq.* 8

ILL. REV. STAT. (1983), Ch. 40, Par. 1505 8

ILL. REV. STAT. (1983), Ch. 40, Par. 1507 8

ILL. REV. STAT. (1983), Ch. 40, Par. 1509 8

ILL. REV. STAT. (1983), Ch. 40, Par. 1510 8

ILL. REV. STAT. (1983), Ch. 40, Par. 1515 8

U. S. SUPREME COURT RULE 17 ..... 2, 10

28 U.S.C. § 2101(c) 2, 3, 9

STATEMENT OF THE CASE

Respondent would submit the following additions to the Statement of the Case found in Petitioners' Petition for Writ of Certiorari.

The evidence at the trial of this matter on October 31, 1983 revealed that the natural mother had been separated from ROBERT W. LEDBETTER, JR. for approximately Nine (9) months prior to her becoming pregnant and that they had lived in different States during that time and had not spoken or had any contact with one another at all. The final Divorce Decree was entered between them shortly after the natural mother became pregnant. From the time Respondent discovered that the natural mother was pregnant until the child was taken from the hospital, Respondent constantly stayed in contact with the natural mother, stating to her that he would support the child when born and that if she did not wish to keep the child, that he wanted to have custody of the child. The natural mother at all times told Respondent that he was the father and testimony from both the Respondent and the natural mother verified that no one else could be the father. Respondent visited the natural mother and the child in the hospital every day from the date of birth, which was on a Thursday through Saturday Evening, when the natural mother requested that he not come on Sunday so she could consider what she wanted to do. The natural father returned to the hospital on Monday morning to visit again with the child and was told that the mother and child had been discharged on Sunday. After contacting the natural mother and finding that she had surrendered the child for adoption, Respond-

ent immediately contacted an Attorney in an attempt to locate where the child had been taken. After the entry of the Order of the Trial Court on October 31, 1983, Respondent had custody of the child from that date until December of that year when the Appellate Court stayed the final Judgment of the Trial Court pending Appeal. Respondent has had custody of the minor child continuously since October 3, 1984.

———o———

SUMMARY OF ARGUMENT

Respondent would submit and request that the Petition for Writ of Certiorari be denied and dismissed for several reasons. First of all, the Petition for Writ of Certiorari was not filed within the prescribed time of Ninety (90) days as prescribed by 28 U.S.C. § 2101(C).

Secondly, the Petition for Writ of Certiorari should be denied and dismissed for the reason that none of the special or important reasons required by Supreme Court Rule 17 exist here. The Petitioners had initially received a full trial and hearing and opportunity for discovery. Thus, the requirements of Due Process and Equal Protection were more than fully satisfied in this case.

Third, the Petition for Writ of Certiorari should be denied and dismissed on the ground that the sole issue in the scope of this Appeal is whether or not the Trial Court correctly followed the Mandate of the Illinois Appellate Court for the Fourth Appellate District in af-

firming its award of custody of the minor child to Respondent after ROBERT W. LEDBETTER, JR. had entered his Appearance and consented to the Orders of the Court by way of a verified pleading. The issues attempted to be raised by Petitioners were rendered *res judicata* by the decision of the Appellate Court of the Fourth Appellate District in the case of *In Re: Baby Girl Ledbetter*, 125 Ill. App. 3d 306, 465 N.E.2d 962 (1984).

Fourth, there is not a substantial difference between and among the State jurisdictions that the putative father has certain rights in the proceeding for an adoption of his natural child.

ARGUMENT

I. Jurisdiction

Respondent would submit that the action has not been timely filed and should be dismissed on that basis. A Petition for Writ of Certiorari must be applied for within Ninety (90) days after the entry of any Judgment or Decree. 28 U.S.C. § 2101(C). The time to petition does begin to run from the date of the denial of the Petition for Rehearing, *provided the Petition for Rehearing is timely. United States v. Healy*, 376 U.S. 75 (1975) 11 L. Ed. 2d 527, 84 S.Ct. 553. The Petitioners did not file their Motion for Leave to File a Motion for Reconsideration until January 7, 1986. This was Four (4) days after being notified by telephone call from the Clerk of the Supreme Court's Office that their Petition for Writ of Certiorari was being returned for not being timely filed. The Order

of the Supreme Court denying their Petition for Leave to Appeal was entered October 2, 1985, not October 8, 1985 as indicated in Petitioners' Appendix, and it was, therefore, more than Ninety (90) days after the entry of that Order on October 2, 1985 that the first Petition for Writ of Certiorari was received by the Supreme Court. The Supreme Court of Illinois subsequently denied the Motion for Leave to File a Motion for Reconsideration. Thus, Petitioners' Motion was not timely filed as it was filed solely for the purpose of expanding the time in which to appeal to this Court. The Order of the Supreme Court of Illinois was also not a ruling on a Motion for Reconsideration. A Motion for Reconsideration was not filed nor considered by the Supreme Court of Illinois.

II. The Matters Attempted To Be Raised By Petitioners Have Been Rendered Res Judicata By The Prior Appeal In This Cause.

The Petitioners' Writ of Certiorari should also be denied because the issue on this Appeal is not the Adoption proceeding. That proceeding has expired and no further Appeal is taken from it. The trial on the Petition for Adoption and Counter-Petition of Respondent for custody was held on October 31, 1983. It was at that trial that the Order of the Trial Court was entered in favor of the Respondent-Counter-Petitioner, JAMES C. ELLISON, FINDING that he was the natural father and that he was not an unfit person to have custody of the child. He did receive custody of the child immediately following the trial, only to have that custody taken away when

the Appellate Court for the Fourth Appellate District of Illinois stayed the judgment pending Appeal. In an opinion filed June 21, 1984, the Appellate Court for the Fourth Appellate District of Illinois remanded the case with specific instructions. As the Appellate Court for the Fourth Appellate District stated in the second Appeal, the clear intent of that Order was to give ROBERT LEDBETTER, JR., who had been married to the mother of BABY GIRL LEDBETTER at the time of her conception and only ROBERT LEDBETTER, JR., the opportunity to assert any rights he might wish to assert and that the previous Order should be confirmed if LEDBETTER appeared but disclaimed any interest in the proceeding. Thus, the intention of the Appellate Court on its June 21, 1984 Order was not to reverse the Trial Court's finding that Respondent was the father and the child should be properly placed with him, but only to afford ROBERT W. LEDBETTER, JR., who had been allegedly married to the natural mother at the time of conception, with an opportunity to come forward and be heard if he so wished. Petitioners did not Appeal that decision of the Appellate Court for the Fourth Appellate District of Illinois. The posture of the case on this Appeal was solely whether the Trial Court properly followed the Order of the Appellate Court in affirming its award of custody to Respondent after ROBERT W. LEDBETTER, JR. had filed a verified pleading stating he did not contest any of the matters of the Court. All other issues were *res judicata*. When a case is remanded with specific instructions, the Trial Court may undertake only such proceedings as conform to those instructions. *Rosenbaum v. Rosenbaum*, 94 Ill. App.3d 352, 49 Ill. Dec. 919, 418 N.E.2d 939, 942 (1st Dist. 1981).

III. The Rights Of Natural Or Putative Fathers Are Well Established.

As to the merits of Petitioners' argument that State Courts are applying differing standards, the first point that should be made is that Adoption is a purely statutory creation and proceeding. Thus, those differences that do exist are attributable to the difference in State Statutes being reviewed. Secondly, close analysis of the cases cited by Petitioners will reveal that none of the decisions abrogates the rights of the natural or putative father. *Brown v. County of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985) dealt with the suit of a State Licensed Foster Parent license, pursuant to California Statutes, to challenge the removal of a foster child from her custody without a prior hearing; *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985) dealt with the case of a 16 year old Russian boy who sought asylum in this country, when his parents returned to the Soviet Union and attempted to take him with them; *Quillion v. Walcott*, 434 U.S. 246 (1978), dealt with the attempt of a natural mother and her current husband to adopt her child that had been in her custody for 11 years, over the objections of the natural father, who had never seen nor supported that child in the 11 year period of time; and of *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), which dealt with the case of foster parents and foster parents' organizations in New York State challenging the constitutionality of the procedures for removal of foster children from foster homes. In the latter case, the Court held that the state wide proceeding was not constitutionally defective. Thus, there is absolutely no evidence at all that State Courts are applying varying tests or burdens

of proof. Any differences at all exist because of differences in the State Statutes which the Courts are interpreting.

IV. Petitioners Were Not Denied Due Process Or Equal Protection At Any Stage In These Proceedings.

Petitioners argue that their fundamental due process rights were violated when they were denied standing to cross-examine MR. LEDBETTER after he entered his Appearance, Disclaimer of Paternity and Response in this case. First of all, there was no hearsay. MR. LEDBETTER filed a verified pleading. This made the action of the Trial Court one in the nature of entering judgment on the pleadings or one of Summary Judgment when no issues remain in controversy after the filing of pleadings. The documents were not admitted as evidence of paternity at trial but as pleadings stating MR. LEDBETTER's position in the case.

The Due Process-Equal Protection clauses of the Constitution as applied to States through the Fourteenth Amendment, establish that a party is entitled to notice and an opportunity to be heard. *Rehbock v. Dixon*, 458 F. Supp. 1056 (D.C. Ill. 1978). In this cause, the Petitioners' initiated the proceedings and had a trial before a Judge after receiving full discovery rights under the Illinois Practice and Procedures Act. They received the fullest protection of the Due Process and Equal Protection clauses. Additionally, if not earlier aware, they were aware of MR. LEDBETTER's existence approximately Five (5) months prior to the trial on the merits when his identity was disclosed at a Discovery and Evidence Deposition of the natural mother. They had full opportunity

to depose him or bring him into the case as a party within that Five (5) month period and voluntarily elected not to do so. They cannot now claim to have been denied due process in being not allowed to take his Discovery Deposition over Two (2) years after they knew of his existence.

The Illinois Adoption Act is contained in Illinois Revised Statutes, Chapter 40, Par. 1501, et seq. Illinois Revised Statutes (1983), Chapter 40, Par. 1510, which was in effect at the time of the original trial in this matter, states as follows:

> "1510 Consents to Adoption. Except as hereinafter provided in this section, Consents shall be required in all cases, unless the person whose consent would otherwise be required shall be found by the Court, by clear and convincing evidence, to be an unfit person, as defined in Section 1. of this Act, or the parent of an adult sought to be adopted. Where Consents are required in the case of adoption of a child, the Consents of the following persons shall be sufficient:
>
> (a) The parents;"

It is clear that Illinois Statutory Law requires consent of both parents and that if a parent does not consent, that parent must be found by clear and convincing evidence to be unfit. The Illinois Statutes further set forth the specific grounds of unfitness in Illinois Revised Statutes (1983), Chapter 40, Par. 1501, Sub-paragraph D. The Act further specifically sets forth where proceedings of Adoption may be commenced (Par. 1505), the contents of the Petition for Adoption (Par. 1507), service of process (1509), and the nature and form of notice to the putative father (1515). There is nothing in the Adoption Act which denies any party the right to a full hearing or notice of

any proceedings, which are the essential elements of due process. *Rehbock v. Dixon*, 458 F. Supp. 1056 (D.C. Ill. 1978).

Additionally, after Petitioners did not pursue the first Appeal any further, they did not have standing to question any of the actions of the Trial Court on remand because as to them, the judgment had become final. Also, ROBERT W. LEDBETTER JR.'s Appearance and Consent to the previous actions of the Court left the Court with no factual issue to determine. His Appearance, Disclaimer of Paternity and Response, as stated, was a verified pleading. Verified pleadings are not hearsay documents and, indeed, the definition of hearsay does not in any way encompass or apply to pleadings.

CONCLUSION

Respondent would submit and request that the Petition for Writ of Certiorari be denied and dismissed for several reasons. First of all, the Petition for Writ of Certiorari was not filed within the prescribed time of Ninety (90) days as prescribed by 28 U.S.C. § 2101(C). The Order of the Supreme Court of the State of Illinois denying Petitioners' Petition for Leave to Appeal to that Court was entered October 2, 1985. The initial Petition for Writ of Certiorari was returned to Petitioners from the Clerk of the Supreme Court's Office for the reason that it was filed more than Ninety (90) days after the entry of that Order. The Motion for Leave to file a Motion for Reconsideration in the Illinois Supreme Court was filed on January 7, 1986, after the return of the in-

itial Petition for Writ of Certiorari. Petitioners' Motion for Leave to File a Motion for Reconsideration was then denied and, thus, no Motion for Reconsideration was actually considered by the Illinois Supreme Court. The filing of the Motion for Leave to File Motion for Reconsideration was an attempt to artificially extend the length of time in which to file a Petition for Writ of Certiorari with this Court.

Secondly, the Petition for Writ of Certiorari should be denied and dismissed for the reason that none of the special or important reasons required by Supreme Court Rule 17 exist here. The Petitioners had initially received a full trial and hearing and opportunity for discovery. Thus, the requirements of Due Process and Equal Protection were more than fully satisfied in this case.

Third, the Petition for Writ of Certiorari should be denied and dismissed on the ground that the sole issue in the scope of this Appeal is whether or not the Trial Court correctly followed the Mandate of the Illinois Appellate Court for the Fourth Appellate District in affirming its award of custody of the minor child to Respondent after ROBERT W. LEDBETTER, JR. had entered his Appearance and consented to the Orders of the Court by way of a verified pleading. The issues attempted to be raised by Petitioners were rendered *res judicata* by the decision of the Appellate Court of the Fourth Appellate District in the case of *In Re: Baby Girl Ledbetter*, 125 Ill. App. 3d 306, 465 N.E.2d 962 (1984).

Fourth, there is not a substantial difference between and among the State jurisdictions that the putative father

has certain rights in the proceeding for an adoption of his natural child.

Respectfully submitted,

THOMAS JORDAN GALLAGHER
(Counsel of Record)
GALLAGHER, FUENTY & KLEIN
Attorneys at Law
155 North Third Street
DeKalb, Illinois 60115
Tel.: (815) 758-7491

AMES & MANECKE
(Co-Counsel)
139 East 1st Street
Coal Valley, Illinois 61240
Tel.: (309) 799-7366

For Respondent